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Supreme Court of United States

OCTOBER TERM, 1963

NO. 690

JOHN H. MICHELL,

Appellant

vs.

LOUISIANA STATE BOARD OF OPTOMETRY EXAMINERS,

Appellee

STATEMENT OF JURISDICTION

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STATEMENT OF JURISDICTION
APPEAL FROM THE SUPREME COURT
OF LOUISIANA

STATEMENT AS TO JURISDICTION

Appellant John H. Michell submits herewith his statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of Louisiana, reported as *John H. Michell vs. Louisiana State Board of Optometry Examiners*, 245 La. 1, 156 So.(2d) 457.

THE OPINIONS BELOW

The opinion of the Louisiana Supreme Court has been reported, supra, and a copy of that opinion is attached hereto as Appedix A. The opinion of the Court of Appeal, Third Circuit, of Louisiana was reported as *John H. Michell vs. Louisiana State Board of Optometry Examiners*, 146 So. (2d) 863, and a copy of that opinion is attached hereto as Appendix B. The opinion of the 9th Judicial District Court in and for the Parish of Rapides, State of Louisiana, the court of first resort, is unreported. A copy of this opinion is attached hereto as Appendix C.

JURISDICTION

1. Appellant initially brought a declaratory judgment and injunction proceeding against the Louisiana administrative agency charged with regulating optometry in Louisiana, seeking to have declared ultra vires a rule adopted by the Board prohibiting optometrists from being employed by corporations to practice optometry and seeking alternatively a determination by the courts of the constitutionality of the entire Louisiana optometry act, but specifically R.S. 37:1042 and R.S. 37:1061 (6) and (13), particularly if those sections of Louisiana law were construed as prohibiting all optometrists from being employed by corporations. The trial Court declared the Board's rule ultra vires and so never reached the constitutional issues; the Court of Appeal reversed and held that the law prohibited optometrists from working for corporations and that the law was constitutional in all respects; and the Supreme Court of Louisiana affirmed the Court of Appeal.

2. The Supreme Court of Louisiana handed down its opinion on June 28, 1963. Appellant's petition for rehearing was denied on October 9, 1963. Notice of appeal to this

Court was filed by appellant with the Clerk of the Supreme Court of Louisiana on January 6, 1964.

3. The jurisdiction of this Court upon appeal is conferred by 28 U.S.C.A. § 1257 (2). Appellant challenges the validity of R.S. 37:1042 and R.S. 37:1061 (6) and (13), as interpreted by the Louisiana Supreme Court, on the ground that, as applied to his activities these La. statutory provisions are repugnant to the Constitution of the United States, and the decision of the highest court of Louisiana in this case was in favor of the validity of the Louisiana statutes.

4. Cases believed to sustain the jurisdiction of this Court on appeal include: *L. K. Liggett Co. vs. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73 L.ed. 204; *Weaver vs. Palmer Bros. Co.*, 270 U.S. 402, 46 S.Ct. 320, 70 L.ed. 654; *New State Ice Co. vs. Liebman*, 285 U.S. 262 52 S.Ct. 371, 76 L.ed. 747; *Schware vs. Bd. of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.ed.(2d) 796; *Konigsburg vs. State Bar*, 353 U.S. 252, 77 S.Ct. 722, 1 L.ed.(2d) 810; *State of Washington ex rel Seattle Title Trust Co. vs. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.ed. 210; *Carter vs. Carter Coal Co.*, 298 U.S. 238, 66 S.Ct. 855, 80 L.ed. 1160; *Eubank vs. City of Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.ed. 156.

5. A copy of the Optometry Law of Louisiana, Chapter 12 Title 37, Louisiana Revised Statutes of 1950, cited as R.S. 37:1041-1065, inclusive, as amended, is attached hereto as Appendix D. We are here concerned particularly and specifically with R.S. 37:1042 and R.S. 37:1061 (6) and (13) which are the statutes involved, within the meaning of 28 U.S.C.A. § 1257 (2), and which read as follows:

"§1042. Louisiana State Board of Optometry Examiners; appointment; terms of members

The Louisiana State Board of Optometry Examiners is created. This board shall consist of five members who shall be registered optometrists and shall have practiced optometry in this state for seven years.

Each member of the board shall be appointed by the governor from a list of five names presented to him by the Louisiana State Association of Optometrists.

The term of each member shall be five years, but vacancies occurring during the term of a member shall be filled for the unexpired term."

"§1061. Causes for refusal of, suspension or revocacation of certificate

The board may refuse to issue or renew, or may suspend or revoke any certificate for any of the following causes:

. . . . . .

(6) Having professional connection with or lending his name to an illegal practitioner;

. . . . . .

(13) Permitting another to use his certificate of registration;

. . . ."

QUESTIONS PRESENTED

1. Whether or not the Louisiana Optometry Act, Revised Statutes of Louisiana, Title 37, §§1041-1065, which has been interpreted by the Supreme Court of Louisiana in R.S. 37:1061 to prohibit optometrists licensed thereunder from practicing while employed by a corporation, may constitutionally so regulate the practice of optometry and whether such a regulation of optometry by this statute bears any reasonable relationship to the public health and

welfare; or whether such a statutory regulation prohibiting optometrists from being so employed is in fact so unreasonable, arbitrary and disassociated from public health and welfare as to render it a denial of due process and equal protection of the laws under the 14th Amendment to the United States Constitution?

2. Whether or not the Louisiana State Board of Optometry Examiners may, consistently with the 14th Amendment to the United States Constitution, and without any amendment of the law itself, change its interpretation and application of the Louisiana Optometry Law from its position promulgated for many years permitting corporate employment of optometrists in Louisiana to a position that the law prohibits corporate employment of optometrists, and particularly to the detriment of this plaintiff and others, who have acted to their detriment on the basis of the previous administrative interpretation of the law and relied thereon in placing themselves in the professional positions now occupied; or whether in fact such an abrupt reversal of administrative interpretation of the law after many years does not violate the constitutional and statutory theory of "contemporaneous construction" and in fact deprive plaintiff and others similarly situated who relied on the prior administrative construction of their property without due process.

3. Whether Louisiana may constitutionally delegate to a private, non-governmental body the power to regulate the practice of optometry in Louisiana, through the control of appointments to the State Board regulating the practice of optometry, as it has done in R.S. 37:1042; or whether in fact such a delegation of control over the optometry field in Louisiana to a private organization does not deprive plaintiff and others similarly situated who are not members of

the designated private organization of their property without due process and without equal protection of the laws.

STATEMENT

Appellant John H. Michell is a licensed Louisiana optometrist since 1948. At all times pertinent herein appellant and others similarly situated were employed as optometrists to practice optometry by a Louisiana corporation, Pearle Optical Co., Inc., owned by Dr. Stanley Pearle, an optometrist licensed in several states, but not in Louisiana. On or about January 27, 1959, the Louisiana State Board of Optometry Examiners adopted a rule prohibiting Louisiana licensed optometrists from becoming or continuing to be employed by corporations (R.20). Pursuant to Louisiana procedural law, appellant filed suit against the Board at its domicile in the Parish of Rapides, State of Louisiana, on June 13, 1959, seeking a declaratory judgment and an injunction. The principal demand of the suit was a judgment declaring that the rule of the Board was ultra vires because Louisiana law did not prohibit optometrists from being employed by corporations to practice optometry. Alternatively, appellant sought to have the Louisiana optometry law declared unconstitutional in toto and in the following specifics:

(1) Appellant contended in the Trial Court in the initial pleadings and in a supplemental petition in the Trial Court, inter alia, that R.S. 37:1042 delegated to a private, non-governmental body (the Louisiana State Association of Optometrists, Inc.) the power to regulate and control all Louisiana optometrists by delegating to that private group the exclusive right to submit a list of names from which the Governor must appoint the members of the Louisiana State Board of Optometry Examiners. Appellant relied on

the 14th Amendment to the United States Constitution, inter alia.

(2) Appellant argued in the original pleadings and since that R.S. 37:1061 (6) and (13), if interpreted by the courts of Louisiana as containing an absolute prohibition on optometrists being employed by corporations, violated the 14th Amendment of the United States Constitution as totally unreasonable, arbitrary and unnecessary for the public health and welfare and an undue invasion by the State of appellant's right to engage in a lawful calling.

(3) Appellant argued in the original pleadings and since that at the time he and others became corporate employees and at the time Dr. Pearle began his business operations as a corporation employing optometrists in Louisiana, the Board in Louisiana was and had been from its inception in 1918 interpreting and applying the Louisiana law as permitting corporate employment of optometrists; and appellant argued that this sudden and abrupt reversal of this interpretation and precedent by the current Board, to the detriment of appellant and other optometrists similarly situated and appellant's employer, Pearle Optical Co., Inc., and Dr. Pearle, was a denial of due process under the 14th Amendment of the United States Constitution and that the reversal of precedent could not be retroactively applied to persons already employed by corporations, or to corporations already functioning.

All these constitutional questions were raised in the pleadings in the Trial Court. The Trial Court did not pass on these constitutional questions per se since it decided that the rule of the Board was ultra vires and contrary to Louisiana law and therefore nuli and void. The defendant Board appealed to the Court of Appeal, Third Circuit, of

Louisiana, and again, in answer to the appeal, appellant raised the identical constitutional questions. The Court of Appeal reversed the Trial Judge and held that the law of Louisiana was consistent with the rule of the Board and prohibited optometrists from being employed by corporations, relying on R.S. 37:1061 (6) and (13). The Court of Appeal then held that R.S. 37:1061 (6) and (13) were both constitutional under the Louisiana and United States Constitutions. The Court of Appeal further held that it could not pass on the constitutionality of R.S. 37:1042 unless the lawsuit were brought against individual Board members to oust them from office. The Court of Appeal held that R.S. 37:1061 was "constitutional, legal and valid" apparently on the basis that since corporations themselves could not be licensed to practice optometry (conceded by all) then corporations could not hire optometrists to practice optometry and on the further basis that employed optometrists would have "no contractural obligations to his clients" and would be "primarily responsible to his employer whose non-professional commercial interest undoubtedly lies in the profit which may derive from the practice of optometry" (R. 189-190). One judge dissented from the Court of Appeal opinion, to some extent on constitutional grounds (R. 192). Appellant applied to the Louisiana Supreme Court for a Writ of Review, urging the same constitutional questions again (R. 196-217). The Supreme Court of Louisiana granted the Writ (R. 218). In its opinion the Louisiana Supreme Court affirmed the opinion of the Court of Appeals on all constitutional issues without further comment, upholding the constitutionality of the state statute in the light of the United States Constitution and the 14th Amendment (R. 229). By petition for rehearing in the Louisiana Supreme Court, the appellant again raised the constitutional issues (R. 237-240),

particularly relying on the decision of this Honorable Court in *Louis K. Liggett Co. vs. Baldridge*, 278 U.S. 105, and the rehearing was refused (R. 245). Thus, we have raised the federal constitutional questions from the inception of this action in our pleadings and briefs and the Louisiana courts have passed upon these constitutional questions finally, upholding the constitutionality of the state statute. Finally, the Louisiana Supreme Court recognized that the constitutional issues have been raised throughout and finally passed upon by itself granting to appellant an order for supersedeas, stay of execution and stay of judgment in this matter pending appellant's appeal under 28 U.S.C.A. § 1257 to this Honarable Court (R. 246-251). This Court will accept the recognition by the State Court that the federal questions were properly raised in that court. *Charleston Federal Savings & Loan Assn. vs. Alderson*, 324 U.S. 182, 65 S.Ct. 624, 89 L.ed. 857.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. Louisiana may not delegate regulation of Optometrists to a private group

In R.S. 37:1042, supra, the Louisiana statute provides that the Governor must appoint each member of the Louisiana State Board of Optometry Examiners, which will regulate all optometrists in Louisiana, from a list of five names presented to him by the Louisiana State Association of Optometrists. The record in this case shows that the Louisiana State Association of Optometrists is a private, nongovernmental corporation. At the time of the trial below, there were 257 registered optometrists in Louisiana and only 105 were members of the Louisiana State Association of Optometrists (R. 44-45). Thus the State delegates to a minority private group the power to absolutely control

appointments to the administrative board regulating all optometrists, including this group's competitors. Testimony from a Board member indicated that only bona fide members of the private group voted on the list of names to be submitted to the Governor (R. 137-138), and that there had never been submitted to the Governor anyone who was not a member of this private group (R. 136-137).

The Louisiana Constitution in Article II, Sections 1 and 2, and Article V, Sections 2 and 11, provides for a separation of the executive and legislative branches of government. We respectfully suggest that this statute of Louisiana vesting control in a minority group of optometrists over all optometrists, including competitors, through a private, non-governmental association, is violative of Amendment 14 of the United States Constitution. We cite to the Court these decisions from other state courts holding similar statutes unconstitutional. *Tucker vs. State*, 218 Indiana 614, 35 NE(2d) 270; *State ex rel Hadley vs. Washburn*, 167 Mo. 680, 67 SW 592; *State ex rel Harvey* vs. *Wright*, 158 SW 823. *Blumenthal vs. Bd. of Medical Examiners*, 57 Cal.(2d) 228, 368 P(2d) 102.

We cite to the Court decisions of this Honorable Court to the same effect. *Eubank vs. City of Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.ed. 156; *State of Washington ex rel Seattle Title Trust Co. vs. Roberge*, 78 U.S. 116, 49 S.Ct. 50, 73 L.ed. 210; *Carter vs. Carter Coal Co.*, 298 U.S. 238, 66 S.Ct. 855, 80 L.ed. 1160.

In *Eubank* this Court held unconstitutional an ordinance which delegated to two-thirds of certain property owners the power to determine how far a building should be set back from a street, holding:

> "The property holders who desire have the authority to establish the line and may do so solely for their own interest or even capriciously."

In *Carter*, this Court considered an act which delegated to producers and miners of coal the power to fix maximum hours and minimum wages and declared the act invalid, holding:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority . . . In the very nature of things one person may not be entrusted with the power to regulate the business of another, especially of a competitor."

The substantial question raised here is whether Louisiana may constitutionally so delegate to this private organization the power to control appointments to the Board of Optometry Examiners and therefore to regulate all optometrists in the State, including immediate competitors. It appears that this question is even more substantial when, as here, the association is completely without official sanction or standing and actually comprises a small minority of practicing optometrists. In effect, under this statute, this minority, which could conceivably become even smaller through selective membership and exclusion rules, has been given complete control over the whole optometry field in Louisiana and the power to make rules for and regulate all optometrists to suit itself. As appears from this record, this private corporation is presently controlled by optometrists who are opposed to the idea of other optometrists being employed in or being located in commercial establishments and the rule adopted by the Board in the instant case reflects this control.

II. The Optometry law cannot constitutionally prohibit all Corporate Employment of Optometrists

In the state courts below, we argued strenuously that the Louisiana law did not prohibit optometrists from being employed by corporations. However, we argued in the alternative that if the law were read as prohibiting optometrists from being employed by corporations, that then it would be unconstitutional under the United States and Louisiana Constitutions. The Supreme Court of Louisiana has now finally held that R.S. 37:1061 (6) and (13) impliedly prohibit optometrists from being employed by corporations. We respectfully submit that as so interpreted the Louisiana statute is unconstitutional.

The right of an individual to pursue a lawful calling is a valuable personal and property right, protected from undue or excessive interference from the states by the 14th Amendment to the United States Constitution. *New State Ice Co. vs. Liebman*, 285 U.S. 262, 52 S.Ct. 371, 76 L.ed. 747; *L. K. Liggett Co. vs. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73 L.ed. 204; *Burns Baking Co. vs. Bryan*, 264 U.S. 504, 44 S.Ct. 412, 68 L.ed. 813; *Weaver vs. Palmer Bros. Co.*, 270 U.S. 402, 46 S.Ct. 320, 70 L.ed. 654; *Schware vs. Bd. of Barber Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.ed. (2d) 796; *Konigsburg vs. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.ed.(2d) 810.

Each of the cases just cited represents a decision by this Honorable Court that an act of a state legislature or an action by a state body unreasonably and therefore unconstitutionally intereferred with an individual's constitutional right to engage in a lawful calling. *In Burns Baking Co.*, supra, the Court held that it was beyond the power of a state "under the guise of protecting the public, arbitrarily

to interfere with private business or prohibit lawful occupations or impose unreasonable or unnecessary restrictions upon them." Similarly in *Liebman*, supra, this Court said:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing a common right to engage in a lawful private business such as that under review, cannot be upheld consistently with the 14th Amendment."

In *Weaver*, supra, this Court said:

> "The business here involved is legitimate and useful; and, while it is subject to all reasonable regulations, the absolute prohibition of the use of shoddy in the manufacture of comfortables is clearly arbitrary and violates the due process clause of the 14th Amendment."

In *Liggett*, referring to a pharmacist's profession, the Court said:

> "That appellant's business is a property right, Duplex Co. vs. Deering, 54 U.S. 443, 465; Truax vs. Corrigan, 257 U.S. 312, 327, and as such entitled to protection against state legislation in contravention of the federal constitution is, of course, clear . . . . The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution."

In a fairly recent case, this Court in *Schware*, supra, said:

> "A state cannot exclude a person from the practice of

> law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the 14th Amendment (cites authorities). A state can require standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

We respectfully submit that under these authorities, including the recent *Schware* case, a regulation which prohibits optometrists from being employed by corporations is arbitrary and unreasonable and has no possible rational relationship with public health or welfare. To require as a qualification for continuing to be an optometrist that one resign his employment because the employer is a corporation as distinguished from an individual, cannot possibly have any "rational connection with the applicant's fitness or capacity to practice" optometry.

In *Liggett*, supra, this Court held that it was unreasonable and therefore unconstitutional for Pennsylvania to require that licensed Pennsylvania pharmacists could only work for corporations in which all the stockholders were licensed Pennsylvania pharmacists. The Court noted that the Pennsylvania statute otherwise regulated the activities of the pharmacists themselves in great detail for the public welfare and health and held:

> "Thus, it would seem, every point on which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded.
>
> . . . . . .
>
> "In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise

> doubtful, that mere stock ownership in a corporation, owning and operating a drug store can have no real or substantial relation to the public health; that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, insofar as it appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. It is a matter of public notoriety that chain drug stores in great numbers owned and operated by corporations are to be found throughout the United States. They have been in operation for many years . . . . If detriment to the public health thereby is resultant or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act to be unconstitutional as in contravention of the due process clause of the 14th Amendment."

We respectfully submit that this same reasoning, applied to the case at bar, indicates that this requirement in Louisiana law is equally unconstitutional. This Honorable Court has reaffirmed the principles of the *Liggett* case in the recent *Schware* case, supra.

III. Abrupt reversal of a State Board's Administrative Interpretation of statute may not Constitutionally apply Retroactively to Adversely affect Appellant

Appellant himself has been a licensed optometrist in Louisiana since 1948 and, as of the time of trial, had been employed by Pearle Optical Inc. (Dr. Pearle) for about 8 years. Dr. Pearle, through his Louisiana corporation, has

operated his business and employed Louisiana licensed optometrists to practice optometry in Louisiana for many years prior to this lawsuit and was connected with another corporation in the same type of business for many years prior to that. All of these facts are clear and uncontradicted on the record. The optometry law in Louisiana was enacted in 1918 and, insofar as corporate practice, has never been amended, although appellant introduced evidence that the Board made at least two unsuccessful attempts to amend the statute to prohibit corporate employment (R. 149-182). The record reflects that at the time of the statute's enactment until about 1952, or for about 34 years, the Board's interpretation and application of the law permitted corporate employment of optometrists, which was fairly common throughout this period and the record reflects that appellant was employed by Pearle Optical Inc. and before that by Downtown Optical Inc. during the period when corporate employment of optometrists was not challenged by the Board. The record further reflects that Dr. Pearle began activities in the optometry business through corporate employment of optometrists in Louisiana prior to the time that such employment was ever challenged by the Board and during the period the statute was construed by the Board as permitting corporate employment of optometrists.

The principle of contemporaneous construction of statutes is well recognized, whereby courts apply as law the administrative construction of a statute by the board charged with administering the act, if that construction has been of some duration and particularly if persons have relied on it to their detriment, 82 CJS 358-360, 42 Am.Jur. §78, p. 392. *FTC vs. Mandell Bros. Inc.*, 359 U.S. 385, 391, 79 S.Ct. 818, 823, 3 L.ed.(2d) 893; *United States vs. MacDaniel*, 32 U.S. 1, 8 L.ed. 527; *Sanford's Estate vs. Com-*

missioner of Internal Revenue, 308 U.S. 39, 60 S.Ct. 51, 84 L.ed. 20.

It has been said:

> " 'Contemporaneous construction', within the meaning of the rule, is the construction which executive departments or officers charged with the enforcement of the statute give to it at or near the time of its enactment. The consideration to be accorded executive construction is also especially weighty in the case of statutes prescribing penalties, or levying impositions, where the executive construction has been in favor of the persons affected. In some cases the court has treated contemporaneous and long-followed construction of ambiguous statutes by executive officers or departments as controlling, *or as having the effect of positive law.*" 82 C.J.S. § 359.

Particularly is this true where, as here, the Board itself has unsuccessfully attempted to change the statutory law in the legislature. This Honorable Court has held that courts should properly give weight in interpreting statutes to the legislature's rejection of a proposed change, as indicating that the legislature does not consider the proposal as law and does not want it to be law. *Nitrogen Products Co. vs. U.S.*, 288 U.S. 294, 53 S.Ct. 350, 77 L.ed. 796; *Costanzo vs. Tillingboat*, 287 U.S. 341, 53 S.Ct. 152, 77 L.ed. 350; *Federal Trade Commission vs. Bunte Bros.*, 312 U.S. 349, 61 S.Ct. 580, 85 L.ed. 881.

We respectfully submit that the contemporaneous construction given this statute as to corporate employment of optometrists for 34 years, upon which appellant and his corporate employer have relied to their great detriment, as have many others in appellant's same position, has acquired the force of law. This is particularly true where the legis-

lature has refused to amend the law upon request to change the administrative and contemporaneous construction. We suggest that defendant's abrupt reversal of this administrative and contemporaneous construction deprives appellant and his corporate employer, as well as many others similarly situated, of their personal and property rights without due process of law and therefore violates the 14th Amendment of the United States Constitution.

We emphasize that if the rule on corporate employment were applied prospectively only, this particular argument would lose its validity. However, if the rule is applied retrospectively to adversely affect persons who have relied upon prior Board interpretation, or to require these persons to change their business or their status, then the rule violates the Constitution. This Court has held that courts have inherent power to limit decisions to prospective operations. *Great Northern Railway Co. vs. Sunburst Oil & Rail Co.*, 387 U.S. 358, 53 S.Ct. 145, 77 L.ed. 360; *James vs. U.S.*, 366 U.S. 213, 81 S.Ct. 1052, 6 L.ed.(2d) 246.

CONCLUSION

Appellant respectfully suggests that this appeal brings before this Court federal questions under the Constitution that are far-reaching and important, both in terms of legal principles and of practical impact upon the general public which patronizes optometrists throughout the nation and of course upon optometrists themselves. At stake is the right to livelihood by this appellant and other optometrists similarly situated and the natural effects upon the general public of a decision which affects this appellant's right to engage in his occupation free from unreasonable prohibitions. Enough has been said to demonstrate that the ques-

tions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

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Appellant

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Statement of Jurisdiction has been mailed this 5th day of March, 1964 to William J. Wegmann, American Bank Building, New Orleans 12, Louisiana, counsel of record for Louisiana State Board of Optometry Examiners, defendant-appellee, first class postage prepaid. March 5, 1964.

Thomas J. Meunier

APPENDIX A

JOHN H. MICHELL

v.

LOUISIANA STATE BOARD OF OPTOMETRY EXAMINERS

No. 46549

Supreme Court of Louisiana

June 28, 1963

Rehearing Denied Oct. 9, 1963

245 La. 1, 156 So.(2d) 457

Thomas J. Meunier, of Dodd, Hirsch, Barker & Meunier, New Orleans, for plaintiff-relator.

William J. Wegmann and Patrick J. Butler, of Racivitch, Johnson, Wegmann & Mouledoux, New Orleans, for defendant-respondent.

HAMLIN, Justice.

John H. Michell, a qualified and duly licensed optometrist in Louisiana, instituted the present declaratory judgment proceeding. He alleged that because his employer, Pearle Optical, Inc., was not the holder of a Louisiana optometrist's license, he was threatened with the imminent loss of his right to practice his profession as an employee of Pearle Optical, Inc., and that he was adversely affected by the following rule and regulation of the Louisiana State Board of Optometry Examiners (Hereinafter designated as Board):

"* * * THEREFORE, the Board has unanimously adopted the following rule and regulation for the purpose of administering the provisions of R.S. 37:-1041, et seq.:

"a) An Optometrist, duly licensed under the provisions of the Louisiana Optometry Law as set forth in LSA-R.S. 37:1041, et seq., is prohibited from accepting employment as an Optometrist from a corporation.

"b) An Optometrist, duly licensed under the provisions of the Louisiana Optometry Law as set forth in LSA-R.S. 37:1041, et seq., is prohibited from accepting employment as an Optometrist from a partnership composed of persons other than duly licensed optometrists.

"Optometrists so employed (a & b) shall be considered in violation of the provisions of R.S. 37:1061, and as such subject to refusal by the Board to renewal of his or her Optometry License on its annual renewal date—March 1st of each year (R.S. 37:1056) and or subject to suspension or revocation of his certificate to practice upon due notice and hearing as provided in R.S. 37:1062."[1]

Plaintiff prayed, (1) that the rule and regulation, supra, be declared ultra vires of the Board's powers; (2) that it be declared contrary to the applicable provisions of law and therefore unlawful, null, and void; (3) that the Board be decreed to be without power or authority to issue the rule and regulation; or, alternatively, (1) that those parts of LSA-R.S. 37:1041-65 which empowered the Board to issue the rule and regulation be declared uncon-

[1] The rule and regulation was sent to all Louisiana Registered Optometrists on January 27, 1959, the letter of transmittal stating that it was in effect. The copy of the rule and regulation contained in the record bears no date.

stitutional, null and void; or alternatively (2) that the entire Optometry Act, LSA-R.S. 37:1041-65, be declared unconstitutional, null and void.

In an amending and supplemental petition, plaintiff alleged that the Optometry Act, particularly LSA-R.S. 37:1042, was unconstitutional, null, and void under the Fourteenth Amendment to the United States Constitution and Articles I and II of the Louisiana Constitution of 1921, in that the Act establishes a board with power to regulate plaintiff's business and in effect delegates to the members of a private, non-official and non-political association or organization, namely the Louisiana State Association of Optometrists, the power to name the members of the Board through exclusive recommendation to the Governor of Louisiana who is bound to select members of the Board from said recommendations, thus depriving plaintiff of his property without due process and depriving him of equ rotection of the laws.

The trial court rendered judgment in favor of plaintiff, decreeing that the rule and resolution complained of by plaintiff was ultra vires of the Board's legal authority and was illegal, null, and void. It stated:

> "Inasmuch as the Legislature has merely entrusted to the Board the power of administering the Act, and nothing more, and this in unmistakable language, there is no room for the argument that the Board, in adopting the contested rule or regulation, was exercising a delegated power. The inevitable conclusion is that the resolution of January 27, 1959 is ultra vires."[2]

[2] The trial court had previously rendered judgment dismissing plaintiff's suit; it felt that a declaratory judgment action was not available to plaintiff since he had not exhausted his administrative remedies. The Court of Appeal remanded the matter. 128 So.2d 825.

The Court of Appeal (146 So.2d 863) reversed the judgment of the district court and rendered judgment in favor of the Board, recognizing the "January 27, 1959" regulations as proper and in keeping with the provisions of the Optometry Act. The Court found that Dr. Michell's constitutional challenges were without merit.

In the exercise of our supervisory jurisdiction (Art. VII, Sec. 11, LSA-Const. of 1921) we directed certiorari to the Court of Appeal, Third Circuit, 243 La. 1019, 149 So.2d 768, primarily to review its holding that the rule and regulation under attack was not ultra vires of the Board's powers. Herein, plaintiff sets forth the following assignment of errors:

> "1. The Court of Appeal erred in overruling the district court's judgment that the Board's rule was illegal, null and void and *ultra vires*. The Court of Appeal erred specifically in finding that R.S. 37:1061 prohibits optometrists from accepting employment from a corporation to practice optometry.
>
> "2. The Court of Appeal, and the district court, erred in holding R.S. 37:1042 constitutional despite its delegation of the executive power of the Governor to a private individual.
>
> "3. The Court of Appeal, and the district court, erred in holding the whole optometry act constitutional despite its general delegation of legislative power to the Board, despite its unreasonable and arbitrary regulation of a lawful calling.
>
> "4. The Court of Appeal erred in applying this new ruling and interpretation of the optometry act to the pre-existing business and relationships of plaintiff, others situated like him, and plaintiff's employer."

The Board contends that if an individual is illegally practicing optometry, the Board has a duty imposed upon it to stop such illegal practice. It argues that if a licensed optometrist is making the illegal practice possible, the activities must be halted within the frame-work of the optometry law. It states that the sole purpose of the resolution in question was to administratively advise licensed optometrists of the prohibitions against corporate practice as contained in the optometry law, and that the resolution contains no expansion of the legislative mandate, nor is it an attempt by the Board to itself legislate.

The facts in the instant matter are simple. Plaintiff's employer is Pearle Optical, Inc., in which the majority stockholder is Dr. Stanley Pearle, an optometrist licensed to practice in Texas and Pennsylvania. This Company employs licensed optometrists and establishes locations in which they shall practice. In plaintiff's case, it furnishes a great part of his instruments or equipment; his quarters are in Gordon's Jewelry Store in Baton Rouge; he receives a fixed salary, plus commission, and he has nothing to do with the financial arrangements or operations of the Company.

Plaintiff admits that he works for a corporation; he contends, however, that the corporation does not practice optometry. In brief he states:

> "The record as a whole clearly shows that the corporation as such never practiced optometry. On the contrary, that is exactly why it hired this plaintiff, a licensed optometrist. The corporation cannot practice optometry, so it has hired plaintiff to do

that as an overall part of the corporation's business structure."[3]

"The legislature in the exercise of the police power and for the protection of the public health and welfare may control and regulate the practice of optometry, and a state board of optometry can adopt no rules and regulations which are inconsistent with the express provisions of a statute. * * *

"Ordinarily, the primary purpose of statutes regulating the practice of optometry is to protect the public health and safety, and not to put any special restrictions on persons practicing optometry, or to create a monopoly for, confer any special privileges on, or protect the interests of, such persons, except in so far as their advancement in skill and efficiency serves the primary purpose of the law. Nevertheless, some legislation dealing with the practice of optometry is designed not only for the protection of the public health and welfare, but also the protection of the rights and interests of those lawfully engaged in that calling or profession.

"Statutes relating to the practice of optometry must be construed in the light of the purposes of their enactment. An optometry statute which abridges and regulates existent rights must be strictly construed, and should not be extended by judicial interpretation beyond the clear intent of the legislature as discovered in the statute itself. * * *" 70 C.J.S. Physicians and Surgeons § 3, pp. 823-825. See, State v. Rones, 223 La. 839, 67 So.2d 99.

The Louisiana Optometry Act, as set forth in the Revised Statutes, provides that the Louisiana State Board of Optometry Examiners may promulgate and publish rules

[3] Plaintiff's Counsel stated in court that plaintiff's employer would be responsible for any tortious act commited by plaintiff.

and regulations for the purpose of administering the provisions of this Chapter (Chapter 12, LSA-R.S. 37:1041-65). LSA-R.S. 37:1048(2). In LSA-R.S. 37:1049, the qualifications and requirements of applicants are specified as follows:

"All persons desiring to practice optometry shall:

"(1) Be citizens of the United States, of good moral character;

"(2) Have graduated from an approved high school or school maintaining a similar standard;

"(3) Have graduated from a school or college of optometry approved by the board;

"(4) File with the secretary of the board upon the form furnished an application under oath stating that he fulfills each requirement of this Section and include with the application the papers required by R.S. 37:1050; and

"(5) Pass the examination required by R.S. 37:-1051."

In LSA-R.S. 37:1041(3), in defining "Optometry" it is stated that "Optometry" means that practice in which a person employs or applies any means other than the use of drugs, * * *; LSA-R.S. 37:1051 sets forth the subjects on which the examination must be based; LSA-R.S. 37:-1052 states that if the applicant successfully passes the examination * * * he shall receive from the Board a certificate entitling him to practice optometry in this State.

In reading the above statutory provisions it is self-evident that a corporation or artificial being could not

meet the requirements recited, and that the Optometry Act by its very language contemplated within its bounds natural persons and not a corporate group of individuals existing by permission of law.

The causes for refusal of, suspension, or revocation of a certificate to practice optometry are set forth in LSA-R.S. 37:1061. In Sub-section (6) it is stated that the Board may refuse to issue or renew, or may suspend or revoke any certificate to a practitioner for "[h]aving professional connection with or lending his name to an illegal practitioner." Sub-section (13) provides the same treatment to a practitioner for "[p]ermitting another to use his certificate of registration."

> "Legislation must often be adapted to complex conditions involving a host of details with which the legislature cannot deal directly, and certainly the legislature cannot deal with the details of each particular case that may arise in the administration of an act. The legislative process would frequently bog down if the legislature were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. The legislature can only legislate so far as is reasonable and practicable and must leave to executive officers the authority to accomplish its purpose. Necessity fixes a point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules for the purpose of avoiding an unconstitutional delegation of legislative power * * *
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> * * * * * * *
>
> "Where the legislature has laid down the fundamentals of a law, it may delegate to administrative agencies broad powers to fill up the details, within

prescribed limits, by the determination of facts or the enactment of rules and regulations, and it is of no constitutional significance that the administrative agency in executing legislative policies also has discretion to fashion remedies of a civil nature necessary for obtaining the desired goals. * * *" 1 Am.Jur.2d Administration Law Sec. 111, p. 910.

"The legislature may delegate its authority to make findings of fact, and the fact-finding power may be conferred for putting into effect, suspending, or applying the law. * * *" 1 Am.Jur.2d Administrative Law Sec. 125, p. 933.

"The legislature, having declared its policy and purpose and provided standards for the exercise of the power, may confer upon administrative agencies the power to enact rules and regulations to promote the purpose and spirit of the legislation and carry it into effect, and, even though such rules and regulations are given the force and effect of law, there is no violation of the constitutional inhibition against delegation of the legislative function. A legislature or other law-making body, in enacting a law complete in itself and designed to accomplish the regulation of particular matters falling within its jurisdiction, may expressly authorize an administrative agency, within definite valid limits, to provide rules and regulations for the complete operation and enforcement of the law within its express general purpose.

"The authority to make the rules to carry out a policy declared by the lawmaker or to effect its operation and enforcement is administrative and not legislative, * * *" 1 Am.Jur.2d Administrative Law Sec. 126, p. 935.

[1] In adopting the rule and regulation under attack, the Board interpreted the Optometry Act (enacted for the public health and welfare) to the effect that an optom-

etrist employed by a (partnership or) corporation would be violating LSA-R.S. 37:1061 by associating with an illegal practitioner. The Act does not define an illegal practitioner; it follows, however, that one who cannot meet the requirements of the statute—such as a corporation—is not a legal practitioner. As stated by the Court of Appeal, "The conclusion is further inescapable that since a corporation may not be licensed to practice optometry any professional connection with a corporation by a licensed optometrist would violate LSA-R.S. 37:1061(6)."

[2] We conclude that the rule and regulation of the Board was administrative and not legislative. It was adopted under the rule making power of the Board; it was an exercise of vested discretion which was not performed in an arbitrary or illegal manner. The attacked rule and regulation was therefore not ultra vires of the Board's powers.

[3, 4] The practice of optometry is closely related to the public health and public welfare; under its police powers, the Legislature is permitted to regulate this practice. State v. Rones, 223 La. 839, 67 So.2d 99, and authorities quoted supra. The police power of the State, which is co-extensive with sovereign power, denotes the power of the State to impose restraints on private rights which are for the general welfare. Plebst v. Barnwell Drilling Company, 243 La. 874, 148 So.2d 584. See, Olan Mills, Inc., of Tennessee v. City of Bogalusa, 225 La. 648, 73 So.2d 791. If plaintiff suffers any restraints under the Optometry Act, such were within the constitutional power of the Legislature to enact, there being no prohibition with respect to their adoption.

The Court of Appeal (146 So.2d 863) correctly answered the constitutional issues asserted by plaintiff in that Court and herein assigned as Errors Nos. 2 and 3; we see no necessity for repeating herein its rulings.

For the reasons assigned, the judgment of the Court of Appeal, Third Circuit, is affirmed. All costs to be paid by relator, John H. Michell.

APPENDIX B

John H. MICHELL, Plaintiff-Appellee,
v.
LOUISIANA STATE BOARD OF OPTOMETRY EXAMINERS, Defendant-Appellant.

No. 619
Court of Appeal of Louisiana
Third Circuit
Sept. 24, 1962

Rehearing Denied Dec. 10, 1962
146 So(2d) 863

Racivitch, Johnson, Wegmann & Mouledoux, by William J. Wegmann, New Orleans, for defendant-appellant.

Dodd, Hirsch, Barker & Meunier, by Thomas J. Meunier, New Orleans, for plaintiff-appellee.

En Banc.

FRUGE, Judge.

This case comes before this Court for the second time. In the first instance plaintiff instituted a declaratory judgment action, which the trial court dismissed after concluding that his administrative remedies had not been exhausted. On appeal we reversed the trial court and remanded the case for further proceedings. Michell v. Louisiana State Board of Optometry Examiners, La.App., 128 So.2d 825. Subsequently the trial court ruled adversely to the defendant herein and it has appealed this judgment.

The pertinent facts of this case are relatively clear and for the most part, uncontested. Plaintiff is a licensed optometrist employed by the Pearle Optical Company, a Louisiana corporation, where he works full time. This corporation employs plaintiff to perform optometrical services for customers of the corporation and the earnings from these services are the property of the corporation which then remunerates plaintiff. On January 27, 1959, the defendant board adopted and transmitted to all Louisiana optometrists a regulation prohibiting them from accepting employment from a corporation as an optometrist and stating that such prohibited employment would be considered to be in violation of LSA-R.S. 37:1061 and, as such, a cause for refusal to renew and/or for suspension or revocation of the violator's' certificate to practice optometry in Louisiana (LSA-R.S. 37:1062).

In holding that the resolution by the board was ultra vires, illegal, null and void, our learned trial brother stated (Tr. 57-58):

> "R.S. 37:1048, in its pertinent parts, reads:
>
> "Powers of the Board
>
> " 'The board may:
>
> * * *
>
> "(2) Promulgate and publish rules and regulations for the purpose of administering the provisions of this Chapter.
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> * * *
>
> "To the mind of this Court the argument of the defendant Board is constructed upon an entirely false

> foundation. Very plainly, the quoted portion of the statute merely authorizes the making of rules and regulations 'for the purpose of administering the provisions' of the Optometry Act. This is not to say that the Board may enact what is in effect a rule of substantive law regulating the practice of optometry. Such a function is that of the Legislature alone and it has performed that function in adopting the Optometry Act. Inasmuch as the Legislature has merely entrusted to the Board the power of administering the Act, and nothing more, and this in unmistakable language, there is no room for the argument that the Board, in adopting the contested rule or regulation, was exercising a delegated power. The inevitable conclusion is that the resolution of January 27, 1959, is ultra vires. * * *"

Plaintiff-appellee in addition to alleging that resolution of the Board was ultra vires, attacks the constitutionality of the Optometry Statute in toto and more specifically certain sections of the act.

[1] Since the trial court found the resolution of the Board ultra vires it had no occasion to consider the constitutional objections raised by the plaintiff. Accordingly, we may also abstain from ruling on these constitutional issues if we should reach the same conclusion of the trial judge, since questions as to the constitutionality of laws should not be entertained except where necessary to the decision of a case. Parish of St. Landry v. Stout, 32 La. Ann. 1278; Belanger v. Great American Indemnity Co. of New York, 5 Cir., 188 F.2d 196; Succession of Bienvenu, 31 So. 193, 106 La. 595:11 Am.Jur., Constitutional Law, Section 93.

Turning then to the contention that the resolution of the board is ultra vires, this court makes the following ob-

servations. LSA-R.S. 37:1048 titled "Powers of the board" provides that the board may promulgate and publish rules and regulations for the purpose of administering the provisions of Chapter 12 (R.S. 37:1041-1065).

Pertinent to the case at bar, LSA-R.S. 37:1061 provides that "[T]he board may refuse to issue or renew, or may suspend or revoke any certificate for any of the following causes: * * *

"(6) *Having professional connection with* or lending his name to an illegal practitioner; * * *

"(13) Permitting another to use his certificate of registration;" (Emphasis added)

The qualifications and requirements of applicants for a license to practice optometry are set forth in Section 1049 as follows:

"All persons desiring to practice optometry shall:

"(1) Be citizens of the United States, of good moral character;

"(2) Have graduated from an approved high school or school maintaining a similar standard;

"(3) Have graduated from a school or college of optometry approved by the board;

"(4) File with the secretary of the board upon the form furnished an application under oath stating that he fulfills each requirement of this Section and include with the application the papers required by R.S. 37:1050; and

"(5) Pass the examination required by R.S. 37:-1051."

[2] It would seem axiomatic that whereas LSA-R.S. 37:1049 requires a practitioner of optometry to be a person and that to be entitled to practice persons must have heretofore been citizens of the United States and every person of good moral character, possessing specified educational qualifications, being a graduate from a recognized school of optometry of specified requirements, must have passed a requisite examination, that no corporation could be registered and thereby be entitled to practice optometry.

[3] The conclusion is further inescapable that since a corporation may not be licensed to practice optometry any professional connection with a corporation by a licensed optometrist would violate LSA-R.S. 37:1061(6).

In 11 Am.Jur., Constitutional Law, Section 234, it is stated:

> "It is well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action. On the other hand, some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule or the discretion relates to the administration of a police regulation is necessary to protect the public morals, health, safety, and general welfare.
>
> * * * * * * *
>
> "The modern tendency is to be more liberal in permitting grants of discretion to the administrative bodies or officers in order to facilitate the administration of the laws as the complexity of economic and governmental conditions increases."

See National Bank of Commerce of New Orleans v. The

Board of Supervisors of Louisiana State University, Agricultural and Mechanical College, 206 La. 913, 20 So.2d 264.

[4] LSA-R.S. 37:1061 prohibits professional connection with an illegal practitioner. It is true that this section does not define who shall be deemed an illegal practitioner. However, it is self-evident that anyone who cannot meet the qualifications and requirements of Section 1049 is not a legal practitioner. We must therefore conclude that the board neither extended nor limited the intent of the legislature by adopting the resolution affecting corporate employment. Succinctly then, we are of the opinion that the resolution adopted by the board was purely administrative and therefore not ultra vires.

Counsel for plaintiff further contends that LSA-R.S. 37:1042, setting out the method of appointment of the Board of Optometry Examiners is unconstitutional, as violative of the "separation of powers" requirements of Article II, Sections 1 and 2, and Article V, particularly Sections 2 and 11, of the Louisiana Constitution, LSA and the due process clause of the 14th Amendment to the United States Constitution, in that Section 1042 purports to illegally delegate the executive governmental functions of the Governor (power to appoint) and/or the legislative power of the Legislature to a private, non-governmental group.

In an analogous case, Feinblum v. Louisiana State Board of Optometry Examiners, La.App., 97 So.2d 657, our learned brethren in the First Circuit considered the question of whether the Louisiana State Board of Optometry Examiners was illegally constituted and thereby de-

prived of the right to act in accordance with LSA-R.S. 37:1042 and 1062. In its decision, the Court stated:

"There is no question but that a list of names was submitted to the governor by the Louisiana State Association of Optometry, Inc., after 1937 and the defendant board was appointed from a list submitted by the incorporated association of optometrists. The answer of the defendant board to plaintiff's contention and the holding of the trial court that they are illegally constituted and incapacitated to act by virtue of the fact that they were appointed by the governor from a list presented by the Louisiana State Association of Optometry, Inc., rather than by the Louisiana State Association of Optometrists is that they were appointed by the Governor to a de jure office and they are, therefore, de facto officers. It is also contended that they are de jure officers in that the Louisiana State Association of Optometry, Inc., is the Louisiana State Association of Optometrists within the intendment of the Legislature. However, we will consider the defendant board's contention that they are de facto officers and their right to act cannot be collaterally attacked in this proceeding but can only be attacked in a direct proceeding.

"We find in 67 C.J.S. Officers § 135, p. 438, the following with regard to de facto officers:

" 'An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. Generally a person will be held to be a de facto officer when, and only when, he is in possession, and is exercising the duties, of an office, as discussed infra § 137, his incumbency is illegal in some respect, he has at least a fair color of right or title to the office, as discussed infra § 138, or has acted as an officer for such a length of time, and under such circumstances of reputation or ac-

quiescence by the public and public authorities, as to afford a presumption of appointment or election * *.'

* * * * * * *

"It is also well settled that the right of a de facto officer to exercise the function of an office cannot be attacked collaterally, but that a direct proceeding to try title to the office is necessary. State v. Sadler & Campbell, 51 La.Ann. 1397, 26 So. 390; State v. Schuermann, 146 La. 110, 116, 83 So. 426; State v. Moreau, 153 La. 671, 96 So. 527; State ex rel. Wilkinson v. Hingle, 124 La. 655, 50 So. 616; State v. Williams, 35 La.Ann. 742; State ex rel. Williams v. Portsdorf [Pertsdorf], 33 La.Ann. 1411."

[5] Learned counsel for plaintiff contends that the case at bar may be distinguished from the Feinblum decision in that no constitutional question was raised in the latter. With this contention we cannot agree. The acts of a de facto officer are valid and legal until he is ousted by a direct proceeding. Our Supreme Court said in State ex rel. Floyd v. Hodges, 165 La. 552, 556, 115 So. 747:

"If one in possession of office, under color of title, could not be required, during his incumbency, to discharge the duties of the office, the public might suffer until his title to it could be ascertained in a proper proceeding. The acts of an officer de facto are valid as to third persons and the public. Williams v. Police Jury, 160 La. 325, 107 So. 126; State v. Moreau, 153 La. 671, 96 So. 527."

[6, 7] Thus, even if the board was not legally constituted, its acts must be given effect. To rule on the constitutionality of the board's delegation would be dicta since it can have no bearing on the decision of this case. We therefore must hold that the question of whether the

board is illegally constituted must be presented in a direct proceeding to try title and cannot be attacked collaterally.

The next contention made by the plaintiff is that LSA-R.S. 37:1061, if construed by this Court to prohibit corporate employment of optometrists, be declared unconstitutional, as violative of the "equal protection of the law" requirement of the Fourteenth Amendment of the United States Constitution and Article I, Section 15 of the Louisiana Constitution, in that such a prohibition is arbitrarily and unreasonably discriminatory against designated classes of persons (corporation employees) without valid reason for distinction.

[8, 9] Every statute is presumed to be constitutional and it is the duty of a court to uphold its validity wherever possible. Pursuant to this well established principle every consideration of public welfare and public policy upon which the Legislature could reasonably have based such legislation should be considered, and, if the statute in question is not clearly arbitrary, unreasonable or without adequate basis, it should be upheld as constitutional. State v. Rones, 223 La. 839, 67 So.2d 99; Michon v. Louisiana State Board of Optometry Examiners, La.App., 121 So.2d 565.

[10] The reasonableness of a rule prohibiting unqualified persons from practicing optometry cannot be seriously disputed. A corporation cannot obtain a license to practice optometry. To say that this rule can be circumvented by hiring those who are licensed optometrists and thereby reaping the benefits of their practice is to render LSA-R.S. 37:1061 meaningless. To permit indirectly that

which is clearly prohibited directly is to disregard the will of the legislature as manifested by Section 1061.

An optometrist who practices his profession as the employee of one who is not a member of that profession is apt to have less regard for his professional responsibility when he has no contractual obligations to his clients, and is primarily responsible to his employer whose non-professional commercial interest undoubtedly lies in the profit which may be derived from the practice of optometry.

We therefore conclude that Section 1061 whose constitutionality is attacked by plaintiff meets the tests of the objections and is constitutional, legal and valid.

Lastly, plaintiff contends that the optometry statute is unconstitutional in toto as violative of the due process sections of the 14th Amendment to the United States Constitution and the "separation of powers" requirements of Article II, Section 2, of the Louisiana Constitution, as well as the "due process" clause of the Louisiana Constitution by delegating unrestricted and unrestrained arbitrary powers to administrative officials without proper guides or criteria and by unconstitutionally delegating legislative authority to such administrative officials.

[11-13] It is a well settled rule that before a court will consider the constitutionality of a law, he who urges its unconstitutionality must show specifically wherein it is unconstitutional. Sulka & Co. v. City of New Orleans, 208 La. 585, 23 So.2d 224; City of Shreveport v. Pedro, 170 La. 351, 127 So. 865. A general allegation to the effect that an entire statute is unconstitutional without specifying the relationship of this issue to the determina-

tion of the case at bar does not meet the requirements of this rule. Furthermore, we find adequate guides set forth in LSA-R.S. 37:1049 and 1061 which are pertinent to the disposition of this case. We therefore find this allegation without merit.

For the above and foregoing reasons, the judgment of the District Court herein declaring the resolution of the defendant Board ultra vires is reversed and set aside and judgment is rendered in favor of the defendant Board, recognizing the January 27, 1959 regulations as proper and in keeping with the provisions of the Optometry Act.

Reversed and rendered.

TATE, J., dissents with written reasons.

TATE, Judge (dissenting).

I respectfully dissent.

Regulations and rulings by an administrative board are ultra vires and null and void when beyond the scope of the power delegated by the legislature to the administration agency. See, e.g., Pearce v. Kramer, La.App., 3 Cir., 128 So.2d 304, certiorari denied. In my opinion, in holding that the present defendant Board has the power to make illegal the employment of optometrists by corporations, my brethren of the majority have read into the legislative delegation of regulatory powers to such board a meaning which is not only absent therefrom, but one which the legislature itself refused to amend the act to provide.

The majority has held that, since a corporation itself may not obtain a license to practice optometry, the board

may suspend or revoke the certificate of an optometrist who is employed by a corporation on the legislatively-conferred grounds that such optometrist has a "professional connection with" or is "lending his name to an illegal practitioner," LSA-R.S. 37:1061(6), or is "permitting another to use his certificate of registration", LSA-R.S. 1061(13). That is, the majority feels that the corporation itself is practicing optometry through its employee, and that therefore the licensed optometrist is aiding an illegal practitioner (i.e., the corporation) or is permitting the corporation to use his license.

This is certainly a reasonable construction of the statute, and a substantial number of states with similar statutes have similarly construed it.

But likewise a substantial number of other states have construed similar statutory provisions to the contrary. These other states have held that the corporation itself is not practicing optometry, so that an optometrist employed by it is not aiding an illegal practitioner and is not letting another person use his license—i.e., that the meaning of the statutory provisions is simply to require that qualified optometrists prescribe glasses for persons needing them, whether the optometrists are working for themselves or for a corporation. (E. g., just as a hospital corporation, which may not as a corporation legally receive a license to practice nursing, LSA-R.S. 37:921, may employ nurses without being engaged in the illegal practice of nursing.)

And in Louisiana, as the record shows, this latter was the settled administrative construction of the statutory provisions in question regulating the practice of optom-

etry, LSA-R.S. 37:1041 et seq. From 1918, when the first regulatory statute on the subject was adopted, until 1952, the administrative board enforcing the provisions of the statute never interpreted the provisions thereof to mean that a licensed optometrist could not work for a corporation, or that his employment by the corporation would violate the provisions of the statute by permitting another to use his certificate or by aiding an illegal practitioner. It must be presumed that this settled administrative construction was the meaning of the statutory provisions intended by the legislature, since the legislature did not amend these statutory provisions over the years.

Not only this. In 1956 and 1958 amendments to the regulatory statute were sought to give the Board the power which this court now holds that it had all along to prohibit the corporate employment of optometrists; but the legislature refused to amend the act to so provide.

For instance, by Senate Bill 135 of the 1956 session, an amendment was sought by which the provision set forth at LSA-R.S. 37:1061(6) would be amended to read as follows (the additional languages sought being italicized):

"The board may refuse to issue or renew or may suspend or revoke any certificate * * * for any of the following causes:

* * *

"(5) Having professional connection with, or lending his name to an illegal practitioner of optometry, *conducting eye examinations or performing any optometric service, directly or indirectly, as an employee or associate of a person, firm, corporation, partnership or group of persons*

who are not licensed to engage in the practice of optometry in Louisiana * * *"*

(This is the meaning given to the section by the present majority opinion of this court. It is *not* the meaning given to the section by the settled administrative construction of the rule from 1918 up through abortive efforts by the board to so construe the act in 1952, which finally eventuated in the regulation of 1959, the validity of which the petitioner contests by the present declaratory action.)

The Official House Calendar of the 1956 session of the Louisiana legislature shows that on July 3rd, Senate Bill 135, containing the above and other provisions of like import, came to a vote in our House of Representatives and was defeated.

When, as in the present instance, a statute is ambiguous so that it may reasonably be given two meanings, great weight must be given to the meaning provided by a settled administrative construction over a long period of time. Roberts v. City of Baton Rouge, 236 La. 521, 108 So.2d 111. As this decision also notes, in determining the meaning of a legislative enactment it is proper to take into consideration the legislative history of the statute. Under these criteria, my brethren of the majority are in error in assigning a meaning to the ambiguous statute which is contrary to the settled construction of it for over thirty years and, moreover, a meaning which the legislature itself refused to amend the statute to provide.

The purpose of the courts is to interpret legislation, not to legislate. With deference to the majority, I think they

have been persuaded into adopting what may be a desirable construction of the statute by the no doubt commendable aims of the "ethical" optometrists to professionalize their calling (as contrasted with the "commercial" optometrists, who according to the record comprise about half the number of licensed optometrists and whose present employment by corporations will become illegal if the majority opinion stands). The majority nevertheless has adopted a construction of the statute which is contrary to that intended by the legislature, as instanced by the legislative history and administrative construction of the statute over the years.

As a legislator, I might well wish to amend the statute to accord it the meaning now given it by the majority; as a judge I cannot. It is for the legislature, not the courts, to amend statutory enactments.

For the above reasons, I respectfully dissent.

On Application for Rehearing.

En Banc. Rehearing denied.

TATE, J., dissents from refusal to grant a rehearing.

APPENDIX C

NUMBER 51,999

JOHN H. MICHELL

VS.

LOUISIANA STATE BOARD OF
OPTOMETRY EXAMINERS

NINTH JUDICIAL DISTRICT COURT
PARISH OF RAPIDES
STATE OF LOUISIANA

OPINION OF THE COURT

Inasmuch as complete statements relative to this case and its issues appear in the prior opinion of this Court and that of the Court of Appeal (128 So.2d 825), it would constitute unjustifiable redundancy to repeat them now.

The present task is to render judgment on the merits following the mandate of the Court of Appeal in remanding the case for that purpose.

Initially, there is presented for determination the efficacy of an exception of no cause or right of action raised against plaintiff's supplemental and amending petition which challenges the constitutionality of the Optometry Act, R.S. 37:1041 et seq., in its entirety. Here the focal point of attack is upon the legal status of the defendant Board and its members, the contention being that the statutory provision for the appointment of Board members constitutes a prohibited delegation by the Legislature of

an executive function of the Governor of Louisiana, and its own legislative functions, to a "private, non-official and non-political association or organization, namely, the Louisiana State Association of Optometrists". On the broad principle involved, this writer is unable to distinguish between this case and that of Feinblum vs. Louisiana State Board of Optometry Examiners, 97 So.2d 657. Accordingly, the holding in that case should be given application here. However, because of the holding to be hereinafter stated, it will be more appropriate and correct to dispose of this facet of the case by a general ruling on the merits rather than by a resolution on the pending exception.

Passing now to the remaining issue of the case, circumscribed as it is by the respective pleadings of the parties and the prior pronouncements of both this Court and the Court of Appeal, it should be emphasized that the sole question is whether or not the rule of the defendant Board under attack is, on its face, unconstitutional and, therefore, null and void. With this understanding, no consideration will be given to the broadened arguments of counsel assailing the legality of specific sections of the Optometry Act.

The rule or regulation involved reads:

> "a) An Optometrist, duly licensed under the provisions of the Louisiana Optometry Law as set forth in LSA-R.S. 37:1041, et seq., is prohibited from accepting employment as an Optometrist from a corporation.
>
> b) An Optometrist, duly licensed under the provisions of the Louisiana Optometry Law as set forth in LSA-R.S. 37:1041, et seq., is prohibited from accept-

ing employment as an Optometrist from a partnership composed of persons other than duly licensed Optometrists.

Optometrists so employed (a & b) shall be considered in violation of the provisions of R.S. 37:1061, and as such subject to refusal by the Board to renewal of his or her Optometry License on its annual renewal date—March 1st of each year (R.S. 37:1056) and/or subject to suspension or revocation of his certificate to practice upon due notice and hearing as provided in R.S. 37:1062."

The Court of Appeal, in its opinion, very accurately noted: "It is to be observed that the legislation regulating the practice of optometry does not specifically prohibit the practice of optometry by a corporate employee, and that the Board's contention that the regulation is pursuant to statutory authority rests upon a legal, and what ultimately must be a judicial, interpretation of certain of the statutory provisions. Footnote 1."

"Footnote 1. LSA-R.S. 37:1061 provides, pertinently, only that:

"The board may refuse to issue or renew, or may suspend or revoke any certificate for any of the following causes: * * * (6) Having professional connection with or lending his name to an illegal practitioner; * * * (13) Permitting another to use his certificate of registration;" * * * See also LSA-R.S. 37:1063, which likewise does not provide that the holder of a valid certificate may not practice optometry as an employee of a corporation."

The following statement of the defendant Board's position is taken from the brief of its counsel:

"It is true that the Board cannot impose restrictions not actually set forth in the law. By the same rule, the Board cannot lower the restrictions or waive any restrictions which are contained in the law.

The Board does not now, nor has it ever contended, nor can it ever contend that it has the power to enlarge or to diminish the provisions of the Revised Statutes as found in Chapter 12, Title 37:1041, et seq.

The Board in its answer and in the evidence submitted has consistently stated that the resolution of January 27 is in conformity with the restrictions, prohibitions and or provisions of the law regulating Optometry in this State. A careful reading of the resolution discloses the intent to act within the framework of the statute.

In considering the validity of the resolution, the Court cannot isolate it from the very law which gives the Board the power to make the resolution."

This position is grounded, of course, upon the premise that the Legislature has, in R.S. 37:1048, delegated to the Board the authority to make rules and regulations, such as that herein under attack, in connection with its administrative duties and responsibilities. Counsel argues:

"It is submitted that the law does not contemplate nor demand that every licensing statute will be so specified as to preclude from the administrative board any exercise of discretion or logical reasoning. We live in changing times and it is impossible for any legislature to specify in detail each and every violation. The law does not require such detail. On the contrary, it requires only the establishment

of standards which are sufficiently basic and definite so as to make clear to the administrative board the policy of the legislature. In support of this, we cite 16 C.J.S. Section 138, at page 560:

> "The true distinction is between the delegation of power to make the law which necessarily involved a discretion to what it shall be and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law; and while the first cannot be done, to the latter no valid objection can be made. In order to hold a statute invalid as an unlawful delegation of power, it must be clear that without the exercise of legislative power by the person or body to whom the delegation has been made, the statute remains incomplete so that the legislative will has not been fully made known, but it is only necessary that the statute establish a sufficient basic standard, a definite and certain policy and rule of action for the guidance of the instrumentality that is to administer the law, and the fact that a future contingency controls the operation of a statute does not effect its validity with respect to the delegation of power. . . ."

R.S. 37:1048, in its pertinent parts, reads:

"Powers of the Board

The board may:

* * * * * * *

(2) Promulgate and publish rules and regulations for the purpose of administering the provisions of this Chapter.

* * * * * * *"

To the mind of this Court the argument of the defendant Board is constructed upon an entirely false foundation. Very plainly, the quoted portion of the statute merely authorizes the making of rules and regulations "for the purpose of administering the provisions" of the Optometry Act. This is not to say that the Board may enact what is in effect a rule of substantive law regulating the practice of optometry. Such a function is that of the Legislature alone and it has performed that function in adopting the Optometry Act. Inasmuch as the Legislature has merely entrusted to the Board the power of administering the Act, and nothing more, and this in unmistakable language, there is no room for the argument that the Board, in adopting the contested rule or regulation, was exercising a delegated power. The inevitable conclusion is that the resolution of January 27, 1959 is ultra vires. See State ex rel Rogers vs. Louisiana State Board of Optometry Examiners, 103 So.2d 512.

Accordingly, there is now no occasion to consider whether or not the prohibition in the Board's resolution forbidding the corporate employment of optometrists is the same or an equivalent prohibition stated in R.S. 37:1061, (6) and (13), or R.S. 37:1063.

As matters now stand, petitioner has been subjected to the threat of action being taken against him under the regulation of January 27, 1959, and he is presently seeking relief in connection with that regulation only. Therefore, this is neither the time nor the occasion to consider an interpretation of the statutory provisions just mentioned. The time and occasion for such an interpretation will arise if and when petitioner is proceeded against under these provisions.

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For the foregoing reasons, there should be judgment decreeing that the resolution herein under attack is ultra vires, illegal, null and void.

Walter M. Hunter
DISTRICT JUDGE

FILED IN OPEN COURT
February 6, 1962
Virgie W. Middleton
DEPUTY CLERK OF COURT

A TRUE COPY:
Virgie W. Middleton
Deputy Clerk of Court

NUMBER 51,999

JOHN H. MICHELL

VS.

LOUISIANA STATE BOARD OF
OPTOMETRY EXAMINERS

NINTH JUDICIAL DISTRICT COURT
PARISH OF RAPIDES
STATE OF LOUISIANA

JUDGMENT

This cause came on for hearing on the merits on remand from the Court of Appeal (128 So.(2d) 825):

Present: Thomas J. Meunier
Dodd, Hirsch, Barker & Meunier
711 Carondelet Building
New Orleans 12, Louisiana
Attorney for Plaintiff

William J. Wegmann
Racivitch, Johnson, Wegmann & Mouledoux
2206 American Bank Building
New Orleans 12, Louisiana
Attorney for Defendant

The Court, having heard the testimony and considered the evidence and having heard and considered arguments of counsel, has concluded, for the reasons already reduced to writing, that the law and the evidence favor plaintiff and accordingly:

IT IS ORDERED, ADJUSTED AND DECREED that there be judgment herein in favor of plaintiff, John H. Michell, and against defendant, Louisiana State Board of Optometry Examiners, decreeing that the rule or resolution adopted by the said Board, dated January 27, 1959, pertaining to the employment of licensed optometrists by corporations or by unlicensed persons, is ultra vires of the Board's legal authority and is illegal, null and void.

Alexandria, Louisiana, this 23rd day of February, 1962.

FILED IN OPEN COURT
February 23, 1962
Virgie W. Middleton
DEPUTY CLERK OF COURT

Walter M. Hunter
JUDGE

APPENDIX D

LOUISIANA REVISED STATUTES OF 1950

TITLE 37—PROFESSIONS AND OCCUPATIONS

CHAPTER 12. OPTOMETRY

§ 1041. Definitions

As used in this Chapter, the following terms have the meaning ascribed to them in this Section, unless the context clearly indicates otherwise:

(1) "Board" means the Louisiana State Board of Optometry Examiners.

(2) "Licensed optometrist" means a person licensed and holding a certificate issued under the provisions of this Chapter.

(3) "Optometry" means that practice in which a person employs or applies any means other than the use of drugs, medicines, or surgery for the measurement of the powers and testing the range of vision of the human eye, and determines its accommodative and refractive state, general scope of function and the adaptation of frames and lenses to overcome errors of refraction, and restores as near as possible with these mechanical appliances normal human vision.

§ 1042. Louisiana State Board of Optometry Examiners; appointment; terms of members

The Louisiana State Board of Optometry Examiners is created. This board shall consist of five members who shall

be registered optometrists and shall have practiced optometry in this state for seven years.

Each member of the board shall be appointed by the Governor from a list of five names presented to him by the Louisiana State Association of Optometrists.

The term of each member shall be five years, but vacancies occurring during the term of a member shall be filled for the unexpired term.

§ 1043. Oath of office

All members of the board shall take the oath required of state officers before entering upon the duties of their office.

§ 1044. Removal of members

The Governor may remove any member of the board for inefficiency, neglect of duty or a violation of the provisions of this Chapter.

§ 1045. Officers; meetings;quorum

The board shall choose from its membership a president and a secretary-treasurer. The board shall hold regular seemi-annual meetings. Three members shall constitute a quorum for the transaction of business.

§ 1046. Compensation and expenses of members of board

Each member of the board shall receive no more than eight doliars for each day actually spent on board business and, in addition thereto, mileage over the most direct route, at the rate of three cents per mile while attending meetings of the board. Salaries or expenses of the board shall be paid only out of funds received under this Chapter.

§ 1047. Records; receipts and disbursements

The secretary-treasurer of the board shall keep a full record of all acts and proceedings of the board. All moneys shall be received by him and disbursed in administering the provisions of this Chapter.

§ 1048. Powers of the board

The board may:

(1) Adopt by-laws and regulations for the management of the board and define the duties of its officers;

(2) Promulgate and publish rules and regulations for the purpose of administering the provisions of this Chapter.

(3) Employ the necessary persons, including an attorney, to administer this Chapter and fix their compensation; and

(4) Summon witnesses and compel the attendance of witnesses.

§ 1049. Qualifications and requirements of applicants

All persons desiring to practice optometry shall:

(1) Be citizens of the United States, of good moral character;

(2) Have graduated from an approved high school or school maintaining a similar standard;

(3) Have graduated from a school or college of optometry approved by the board;

(4) File with the secretary of the board upon the form furnished an application under oath stating that he fulfills each requirement of this Section and include with the application the papers required by R.S. 37:1050; and

(5) Pass the examination required by R.S. 37:1051.

§ 1050. Application requirements

The application required by R.S. 37:1049 shall be accompanied by a certificate under oath of the applicant's credits from the schools of his graduation, by a photostatic copy of his diploma or certificate of graduation, by the applicant's fee required by R.S. 27:1058, and by a photograph of the applicant. Failure to comply with these requirements shall constitute sufficient grounds to refuse the applicant the right to take the examination.

The application, together with the supporting documents shall be filed with the secretary-treasurer of the board on or before thirty days prior to the date set for examination.

§ 1051. Examination

Examinations given by the board shall be based upon subjects taught in approved schools and colleges of optometry such as: general anatomy, physics, chemistry, biology, physiology, anatomy and physiology of the eye, ocular pathology, ocular neurology, ocular myology, psychology, physiological optics, optometrical mechanics, visual field charting, orthoptics, clinical optometry, and the applications of the general laws of optics and refraction and such other materials and subjects that are essential in the practice of optometry.

Examinations shall be conducted semi-annually on dates fixed by the board.

All written examinations held by the board and the answers of applicants shall be kept as records by the board for at least one year.

§ 1052. Certificate to practice; registering; evidence

If the applicant successfully passes the examination provided in R.S. 37:1051, he shall receive from the board under its seal a certificate entitling him to practice optometry in this state. This certificate or a renewal thereof shall be the only evidence of the right of a person to practice optometry.

The certificate shall be registered in a record book to be kept by the board for that purpose. A copy of the certificate certified by the secretary of the board shall be received as evidence in all the courts of this state.

§ 1053. Right to retake examination

If an applicant fails to pass the examination provided in R.S. 37:1051 he may, after the expiration of six months, take a second examination without paying an additional fee, if this examination is held within two years after the failure.

§ 1054. Applicant from other states; waiver of examination

The board may waive the examination provided in R.S. 37:1051 if the applicant presents to the board a satisfactory certificate of registration from a board of optometry examiners of another state, and if the standard of re-

quirements adopted and enforced by such board is equal to that provided in this Chapter.

§ 1055. Recording of certificate

Every person before beginning the practice of optometry in this state shall record the certificate issued to him by the board in the parish in which he desires to practice. Until his certificate is recorded he shall not engage in the practice of optometry.

§ 1056. Annual renewal fees

All licensed optometrists shall pay to the board the annual renewal fee provided in R.S. 37:1058 on or before the first day of March of each year.

§ 1057. Revocation for non-payment of renewal fee; reinstatement

The failure to pay the renewal fee required by R.S. 37:1056 shall operate as an automatic revocation of the certificate. In such cases the optometrist may be reinstated if he files an application for reinstatement with the secretary of the board within one year after the revocation and pays the reinstatement fee as provided in R.S. 37:1058 and all delinquent fees.

§ 1058. Fees

The board shall collect the following fees:

(1)	Application fee for examination	$25.00
(2)	Annual renewal fee	40.00
(3)	Reinstatement fee	25.00

§ 1059. Display of certificate

Every licensed optometrist shall display in his place of business the certificate issued by the board.

§ 1060. List of licensed optometrists

The secretary-treasurer of the board shall, under the signature of the president under oath, file annually with the governor a complete list of all licensed optometrists.

§ 1061. Causes for refusal of, suspension or revocation of certificate

The board may refuse to issue or renew, or may suspend or revoke any certificate for any of the following causes:

(1) Conviction of a crime involving moral turpitude;

(2) Securing a certificate by fraud or deceit practiced upon the board;

(3) Soliciting business from house to house or door to door either directly or indirectly;

(4) Continued practice by a person knowingly having a contagious or infectious disease;

(5) Using the title of "Doctor" or "Dr." as a prefix to his name without using the term "Optometrist" as a suffix to his name or in connection with it; or using the title "Doctor of Optometry", "O.D.", "Opt. D.", or "D. O.S." without holding a diploma from an accredited school of optometry;

(6) Having professional connection with or lending his name to an illegal practitioner;

(7) Failing to record his certificate as provided in R.S. 37:1055;

(8) Employing or using "cappers" or "steerers" to obtain business;

(9) Deceiving or defrauding the public;

(10) Employing directly or indirectly any unlicensed persons or suspended optometrists to practice optometry;

(11) Advertising, in untruthful, improbable, impossible, or misleading statemen's with reference to the practice of optometry;

(12) Habitual intemperance or gross immorality;

(13) Permitting another to use his certificate of registration;

(14) Advertising any price, credit terms, or agreement with reference to the practice of optometry;

(15) Using, prescribing, giving away, selling or offering for sale, or having in his possession any eye remedy, lotion, salve, or medicine of any kind or description, or practicing medicine or surgery for the use of carrying on the practice of optometry;

(16) Conviction of any of the provisions of R.S. 37:-1063.

§ 1062. Hearing; appeal

Before any certificate may be revoked or suspended, the board shall grant the holder a public hearing of the charges against him. He shall be given notice in writing of these charges at least fifteen days prior to the date of the hearing, the date of which shall be specified in the notice. He shall be given an opportunity to produce testimony in his favor and to cross examine any witnesses against him.

Any person aggrieved by the decision of the board shall have the right to appeal to the courts of the state.

§ 1063. Violations; penalty

No person shall:

(1) Practice optometry without having complied with the provisions of this Chapter; or

(2) Practice optometry without having a valid certificate to practice as a licensed optometrist; or

(3) Advertise or hold himself out to be an optometrist without having a valid certificate issued by the board; or

(4) Refuse or neglect to display his certificate to practice as required by R.S. 37:1059; or

(5) Purchase or procure by barter any certificate issued by the board with intent to use it as evidence of his qualification to practice optometry; or

(6) Alter materially, with fraudulent intent, a certificate issued by the board; or

(7) Use or attempt to use any certificate issued by the board which has been purchased, fraudulently issued, counterfeited, or materially altered; or

(8) Willfully make any false material statement in an application for a certificate; or

(9) Advertise as free or for a price, any of the following: The examination, or treatment of the eyes; the furnishing of optometrical services; or the furnishing of a lens, lenses, glasses, or the frames or fittings thereof.

The provisions of paragraph (9) of this Section do not apply to the advertising of goggles, sun glasses, colored glasses, or occupational eye-protective devices if they are so made as not to have refractive values.

Whoever violates this Section or any provision of this Chapter, shall, for the first offense, be fined not less than three hundred dollars or imprisoned for not less than thirty days, or both; and, in addition, shall be enjoined from practicing optometry. For each subsequent offense, in addition to being enjoined from the practice, the offender shall be fined six hundred dollars and imprisoned for not less than ninety days.

§ 1064. Injunctions

The board, through its president may, on motion in any court of competent jurisdiction, take a rule on any person who practices optometry in violation of any provision of this Chapter to show cause in not less than two nor more than ten days, exclusive of holidays, after service thereof why he should not be ordered to cease from the further

practice of optometry. This rule may be tried out of term and in chambers; if the rule is made absolute, the order rendered shall be a judgment in favor of the board prohibiting the person from the further practice of optometry in violation of the provisions of this Chapter, and each violation of the injunction shall be considered as a contempt of court and punished accordingly.

§ 1065. Exemptions

The provisions of this Chapter shall not apply to physicians or surgeons licensed to practice in this state nor to retail dealers selling glasses as merchandise in their established places of business. But it is unlawful for any person, except those licensed to practice under the provisions of this Chapter, to have in their possession any trial lenses, trial frames, graduated test cards, or other appliances or instruments for the purpose of rendering assistance to their patrons in the selection of lenses, spectacles, or eyeglasses, or use any device, appliances, or instruments in testing the eyes for the sale of spectacles or eyeglass lenses other than the lenses actually sold, or sell or replace broken lenses in spectacles or eye glasses except upon prescription of a licensed optometrist.

No retail dealer shall directly or indirectly, advertise through any medium the sale of glasses, or peddle, solicit, sell, or offer for sale glasses from door to door, or house to house, or away from his permanent established place of business.

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